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November 19, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petition for Declaratory Ruling, CC Docket No. 96-98*

Dear Ms. Salas:

Attached for filing on behalf of the AT&T Wireless Services, Inc. and VoiceStream Wireless, Corp. are an original and (4) copies of a Petition for Declaratory Ruling in the above-captioned proceeding. We have also enclosed a copy to be date-stamped and returned. Thanks in advance for your assistance

Very truly yours,

Michael H. Pryor

MHP:crl

WDC 213655v1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
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Petition for Declaratory Ruling	)	

PETITION FOR DECLARATORY RULING

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Dated: November 19, 2001

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PETITION FOR DECLARATORY RULING

AT&T Wireless Services, Inc. ("AT&T Wireless" or "AWS"), and VoiceStream Wireless Corporation ("VoiceStream") (collectively "CMRS Petitioners"), by their attorneys, and pursuant to Section 1.2 of the Commission's Rules,[1] hereby submit this petition for declaratory ruling requesting that the Commission confirm that the duty of incumbent local exchange carriers ("LECs") to provide nondiscriminatory access to unbundled network elements ("UNEs"), pursuant to section 251(c)(3) of the Telecommunications Acts of 1996 ("1996 Act"), extends to commercial mobile radio service ("CMRS") providers. In particular, the CMRS Petitioners' request that the Commission affirm that CMRS providers may convert interoffice transmission facilities purchased from incumbent LEC special access or private line tariffs to unbundled dedicated interoffice transport, including transport to and from CMRS base stations. As set forth more fully below, resolution of the CMRS Petitioners' request would settle an existing controversy spawned by the incumbent LECs' refusal to convert special access facilities to UNEs and would serve the public interest.

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[1] 47 C.F.R. § 1.2 (2000). See also 5 U.S.C. § 554(e).

SUMMARY

The 1996 Act requires incumbent LECs to provide UNEs to any "requesting telecommunications carrier" for the provision of a "telecommunications service." The Commission has long recognized that CMRS providers meet these definitions and are thus entitled to the benefits of the 1996 Act's UNE provisions. The Commission has also specifically found that requesting carriers are impaired in their ability to provide service without access to unbundled dedicated transport. This finding of impairment is equally applicable to CMRS carriers. Moreover, the transport that CMRS carriers must currently purchase from incumbent LEC special access tariffs qualifies under the Commission's existing definitions of dedicated transport.

The CMRS Petitioners thus request that the Commission confirm that such transport does indeed qualify as dedicated transport and ensure that incumbent LECs immediately begin working with the CMRS carriers to convert these facilities to UNEs. In particular, the Commission should (i) direct that the conversion of existing facilities requires a simple billing change; (ii) preclude incumbent LECs from requiring termination and a new order to convert existing facilities and (iii) require incumbent LECs to cooperate in a timely and effective manner to help CMRS carriers identify circuits suitable for conversion.

INTRODUCTION AND BACKGROUND

The 1996 Act changed the nation's telecommunications regulatory landscape, in part, by unambiguously requiring incumbent LECs to make available portions of their communications networks to competitors as UNEs. As the Commission is well aware, however, incumbent LECs continually have resisted this mandate, preferring instead to delay competition by raising hyper-technical arguments, and refusing to provide access to their networks as Congress instructed. In this case, incumbent LECs are making irrelevant technical distinctions between wireline and wireless networks as grounds for sweeping rejections of CMRS carriers' requests to obtain certain UNEs that the Commission has already found must be provided. This is not the first time incumbent LECs have pointed to technological distinctions between wireless and wireline networks as an excuse to exclude wireless carriers from the framework the Commission has established to implement the 1996 Act.[2] The Commission rejected those previous efforts as contravening "the Act's goal of promoting the development of new technologies . . ." and it should do so again here.[3] The Commission should therefore issue a definitive ruling that such practices violate the Commission's regulations, and otherwise declare the rights of the CMRS Petitioners.

CMRS providers offer true facilities-based competitive alternatives to incumbent LECs. Increasingly, they are viewed as full-fledged competitors of landline carriers in the provision of telephone exchange service.[4] As Chairman Powell recently noted, alternative, facilities-based platforms, such as wireless networks, offer "real competitive choices" and represent "the best

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[2] TSR Wireless, LLC v. U.S. West Comm., Inc., FCC 00-194, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000) (rejecting incumbent LEC arguments that paging networks do not perform switching and termination functions)"("TSR Order").

[3] Id. at 11179, ¶ 23.

[4] See, e.g., Shawn Young, "More Callers Cut Off Second Phone Lines for Cellphones, Cable Modems," Wall Street Journal, November 15, 2001, at B1.

hope for competition for residential consumers."[5] In rural areas particularly, CMRS carriers are the best hope of a competitive alternative for the individual consumer.

CMRS carriers, however, are saddled with enormous expenditures for incumbent LEC special access interoffice transmission facilities.[6] These facilities are vital to the functioning of CMRS networks, and there exist precious few alternatives outside of incumbent LEC networks. The Commission and Congress identified the availability of unbundled interoffice transport at cost-based prices as integral to the development of competition because it would enable facilities-based carriers to expand without the crushing burden of having to duplicate the incumbent LECs' ubiquitous networks. CMRS carriers are currently entitled to obtain dedicated transport under Section 251(c)(3) of the Act and the Commission's implementing regulations. The incumbent LECs nevertheless have rejected CMRS carriers' repeated requests to convert existing special access facilities to UNEs.

A declaratory ruling is appropriate in this case because there exists a genuine controversy created by the incumbent LECs' rejection of CMRS providers' requests to convert costly special access facilities to UNEs. The CMRS Petitioners have submitted into the record of the local competition docket[7] evidence of their unsuccessful efforts to convert special access facilities to

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[5] See Digital Broadband Migration - Part II, FCC Chairman Michael K. Powell, Speech at FCC Press Conference (Oct. 23, 2001).

[6] For purposes of this pleading, the terms "special access" and "private line" will be used interchangeably. In both cases, the term refers to dedicated, non-switched transport purchased from incumbent LEC federal or state access tariffs.

[7] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order") (subsequent history omitted); see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd 3696 (1999) ("UNE Remand Order") (subsequent history omitted).

UNEs.[8] As reflected in those submissions, AWS and VoiceStream have been requesting the conversion of special access facilities to UNEs since at least the beginning of last year.[9] The incumbent LECs have flatly refused to fulfill any of those requests, raising a number of specious arguments.

DISCUSSION

I. The Duty to Provide UNEs Extends to CMRS Providers.

A. CMRS Providers Are "Requesting Carriers."

Section 251(c)(3) requires incumbent LECs to provide nondiscriminatory access to UNEs to "any requesting telecommunications carrier for the provision of a telecommunications service." CMRS providers are "requesting telecommunications carriers" and the service that they provide is a "telecommunications service," a fact that the Commission has affirmed both before and after the Supreme Court's decision in AT&T v. Iowa Utilities Board.[10] The Commission found in the Local Competition Order that CMRS providers are

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[8] Ex Parte Letter from Michael Pryor, Counsel, AT&T Wireless, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed June 26, 2001); see also Ex Parte Letter from Michael Pryor, Counsel, AT&T Wireless, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed June 27, 2001); see also Ex Parte Letter from Douglas G. Bonner, Counsel, VoiceStream Wireless Corporation, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed June 27, 2001); see also Ex Parte Letter from Douglas G. Bonner, Counsel, VoiceStream Wireless Corporation, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed July 27, 2001).

[9] On February 15, 2000, Carl J. Hansen, then Director of Legal & Regulatory Affairs for Omnipoint Communications (which was merged into VoiceStream last year) wrote to Mr. Marco Pinque, Bell Atlantic (Omnipoint's Account Manager), requesting a briefing on the availability of UNE substitutes for special access DS-1 facilities. Verizon finally responded to Omnipoint's written request on November 2, 2000, citing the use restrictions of the Commission's June 2, 2000 Supplemental Order Clarification. Letter from Chris T. Antoniou, Esq., Verizon Communications, to Douglas G. Bonner, Counsel for VoiceStream (November 2, 2000).

[10] 525 U.S. 366 (1999), remanded to 219 F.3d 744 (8th Cir. 2000), cert. granted sub nom., 121 S.Ct. 877 (2001) (No. 511, 2000 Term). Verizon, for its part, has conceded that CMRS providers are "requesting telecommunications carriers." See Ex Parte Letter from W. Scott Randolph, Verizon Communications, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed August 22, 2001) at 1 n.1.

telecommunications carriers and are therefore "entitled to the benefits" of the 1996 Act's UNE provisions, finding in particular that technology distinctions between telecommunications carriers should be ignored unless there are "compelling" reasons to make distinctions based on technology.[11] This precedent makes clear that the incumbent LECs' unbundling obligation extends to any requesting telecommunications carrier, including CMRS providers. The Commission should declare that CMRS providers are entitled to request UNEs, including, in particular the conversion of special access or private line facilities to dedicated transport. Failure to do so would establish a class of telecommunications carriers, including CMRS carriers and carriers using other alternative technologies to traditional wireline networks, who are not equally entitled to unbundled access to the incumbent LECs' network, in contravention of the 1996 Act and its intention to foster deployment of new technologies.

B. No Separate Impairment Analysis is Required.

Despite this precedent, some incumbent LECs contend that they have no duty to provide access to any particular UNE to CMRS carriers without first conducting a separate analysis to determine whether CMRS carriers would be impaired without such access. There is, however, no basis for a separate impairment analysis of CMRS carriers' requests to convert special access facilities to dedicated transport, either as a legal or practical matter.

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[11] Local Competition Order, 11 FCC Rcd at 15989-16016, ¶¶ 993, 1012, 1041. The Commission repeated this point several years later in the context of requiring -- without a separate impairment analysis -- incumbent LECs to make available 911 databases to CMRS carriers as UNEs. See Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Second Memorandum Opinion and Order, 14 FCC Rcd 20850, 20889-90, ¶ 100 (1999).

1. CMRS Carriers Have No Better Alternatives for Interoffice Transport than Wireline Carriers.

The Commission found in the UNE Remand Order that requesting carriers are impaired without access to interoffice dedicated transport because there are no alternatives available to the requesting carrier, as a practical, economic and operational matter.[12] Specifically, the Commission concluded that "self-provisioning ubiquitous interoffice transmission facilities, or acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier's costs of entering a market or of expanding the scope of its service, delays broad-based entry, and materially limits the scope and quality of a requesting carrier's service offerings."[13]

The exact same analysis applies in this case. CMRS carriers have no better alternatives available for interoffice transport than do wireline carriers. If there is no telecommunications carrier providing transport between locations other than the incumbent LEC, then wireless carriers will be just as devoid of alternatives as their wireline carrier counterparts. Indeed, the lack of ubiquitous alternatives is even more problematic for CMRS providers. Unlike wireline carriers that may need transport from only a relatively discrete number of incumbent LEC wire centers, wireless carriers require transport between virtually every incumbent LEC end office in the entire area served by the wireless carrier. As a result, for example, more than ninety percent of AWS's transport costs go to paying incumbent LECs for special access or private line facilities. VoiceStream obtains approximately ninety-six percent of its high capacity special access circuits from incumbent LECs.

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[12] See UNE Remand Order, 15 FCC Rcd at 3842, ¶ 321.

[13] Id.

Nor are CMRS providers in any better position to self-provision ubiquitous interoffice transport than are wireline carriers. The Commission has concluded that the costs of duplicating the incumbent LECs' ubiquitous network would be "prohibitively expensive."[14] As the Commission noted, these costs include the cost of fiber, the cost of deploying fiber in public rights of way, and trenching.[15] The costs to construct such facilities do not change when CMRS carriers undertake the construction as opposed to wireline carriers. Similarly, CMRS carriers face the same problems of access to rights-of-way and the processing of local applications as do other competitive carriers. Moreover, because CMRS carriers would not be constructing these facilities to provide special access service to large business customers in concentrated locations; there are no cost advantages that might make self-provisioning a more rational economic choice.[16] Rather, CMRS providers would be building duplicative facilities to literally thousands and thousands of base station sites.

The Commission has received evidence on the availability of alternatives to incumbent LEC dedicated transport in three proceedings over the past two years -- the UNE Remand Order, the "EELs Proceeding,"[17] and the petition by Verizon, SBC and BellSouth to remove dedicated

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[14] UNE Remand Order, 15 FCC Rcd at 3855-56, ¶¶ 356-57.

[15] Id.

[16] The Commission has also refused to consider the availability of wireless transport as a potential alternative. UNE Remand Order, 15 FCC Rcd at 3855, ¶ 353. The CMRS Petitioners' utilize microwave transmission in a limited number of locations. Because of the distances involved and susceptibility to atmospheric disturbances, however, microwave transmissions are not well suited for most interoffice transport used by CMRS providers.

[17] See Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, Public Notice No. DA 01-169, CC Docket No. 96-98 (Jan. 24, 2001).

transport and high capacity loops from the UNE list.[18] There is no basis to require yet another round of evidence on this question simply because the user of that transport is a CMRS provider.

2. The Supplemental Order Clarification Does Not Require A Separate Impairment Analysis.

It has been the Commission's consistent policy that once it has identified a network element as subject to the statute's unbundling obligation, the statute requires incumbent LECs to make that element available to any requesting carrier on a nationwide basis. Nonetheless, in rejecting the CMRS Petitioners' request to convert to UNEs interoffice transmission facilities purchased from special access tariffs, some incumbent LECs have taken the position that a separate analysis must be undertaken to determine whether CMRS carriers are impaired without access to dedicated transport UNEs.[19] The basis for this position apparently stems from an overly broad reading of the Supplemental Order Clarification ("SOC").[20]

The SOC, however, did not establish a new rule of general applicability governing access to UNEs. Instead, the SOC asked a very specific question: does a finding that carriers are impaired without access to loop/transport combinations for use in providing telephone exchange service automatically imply impairment without access to those same elements for the sole or primary purpose of providing special access service?[21] As explained in the SOC, special access service is service that "employs dedicated, high-capacity facilities that run directly between the

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[18] Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98, filed April 5, 2001.

[19] See Ex Parte Letter from W. Scott Randolph, Director -- Regulatory Affairs, Verizon, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed August 22, 2001)("Verizon Ex Parte"); see also Ex Parte Letter from Jay Bennett, Executive Director -- Federal Regulatory, SBC, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed July 10, 2001).

[20] In the Matter of Implementation of the Local Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("Supplemental Order Clarification" or "SOC").

[21] Id. at 9596, ¶ 16.

end user, usually a large business customer, and the IXC's point of presence."[22] The question has no relevance to the CMRS Petitioners' request at issue in this petition. It is undisputed that CMRS carriers are not seeking to convert the interoffice transmission facilities they obtain from special access tariffs to provide the special access services at issue in the SOC. As explained below, the service that CMRS carriers will provide with the interoffice facilities that they seek to convert to dedicated transport is predominately telephone exchange service. Additionally, the CMRS Petitioners are not with this petition seeking a ruling to convert special access facilities to loop/transport combinations.[23] They seek instead to convert them to stand alone dedicated transport. The Commission specifically noted that the question of access to stand alone UNEs was not implicated in the SOC's analysis.[24] The SOC's analysis is thus not at all implicated in

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[22] Id. at 9593, n. 36 (citations omitted).

[23] In its August 22, 2001 ex parte submission in CC Docket 96-98, Verizon contends that CMRS carriers could qualify for conversion of these facilities to EELs under the safe harbor provisions of the SOC by certifying that the circuits carry the requisite amount of local traffic. See Verizon Ex Parte, supra note 19, at n. 3. This position is directly contrary to Verizon's earlier position that neither AWS nor VoiceStream could ever meet the SOC safe harbor tests. On January 11, 2001, AWS requested conversion under the SOC safe harbor provisions, certifying that it met the requisite local traffic parameters. By letter dated January 18, 2001, Verizon rejected AWS's certification arguing that CMRS carriers could never comply with the safe harbor standards because circuits terminating to base stations do not connect to a particular end user customer as Verizon contends the SOC standard requires. A copy of Verizon's January 18, 2001 letter was included in AWS's June 26, 2001 ex parte submission in CC Docket 96-98. Similarly, by letter dated November 2, 2000, Verizon advised VoiceStream, in response to a February 15, 2000 letter from Omnipoint Communications (which merged into VoiceStream last year) requesting information about conversion of its Verizon special access facilities to EELs, that VoiceStream could not meet any of the SOC safe harbors "under any of the three circumstances." A copy of Verizon's November 2, 2000 letter was included in VoiceStream's ex parte submission to the Commission on April 13, 2000. It is nothing short of amazing for Verizon to suggest before the Commission that the CMRS Petitioners could seek conversion under the SOC safe harbors when, in correspondence to the CMRS Petitioners, Verizon had specifically rejected their requests to do just that.

[24] SOC, 15 FCC Rcd at 9593, n. 31 (The constraint on IXC conversion of special access services "does not apply to stand-alone loops.").

the CMRS Petitioners' request and it provides no basis for asserting that a separate impairment analysis is required before CMRS carriers may obtain UNEs.[25]

3. The Service Provided by CMRS Carriers Has Already Been Subject to an Impairment Analysis.

Even if the SOC could be deemed to suggest that a service-by-service impairment analysis is now required as a general matter, no such analysis need be undertaken with respect to the CMRS Petitioners' requests to convert special access or private line facilities to dedicated transport. This is because the service that the CMRS carriers provide through the use of these special access interoffice transmission facilities is predominately telephone exchange service -- the service for which the Commission has already conducted its impairment analysis.

The Commission determined in the Local Competition Order that CMRS carriers provide service comparable to telephone exchange service. The Commission ruled that the services that CMRS carriers provide fall within the statutory definition of "telephone exchange service" because "they provide local, two-way switched voice service as a principal part of their business."[26] Indeed, it was on the basis of the determination that CMRS carriers provide

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[25] Some incumbent LECs have argued that the safe harbors established in the SOC for demonstrating sufficient local traffic to convert special access service to EELS are the *only* instances in which any interoffice transmission facilities purchased from a special access tariff can be converted. See Letter from Rick E. Zucker, Sprint, to Daniel Waggoner, Counsel for AWS, dated March 28, 2001, attached to AWS June 26, 2001 ex parte submission in CC Docket 96-98. This is certainly not the case. There is nothing in the SOC to suggest that facilities, particularly stand alone facilities, which qualify as UNEs cannot be converted unless those facilities constitute EELs.

[26] Local Competition Order, 11 FCC Rcd at 16000, ¶ 1013.

telephone exchange service that the Commission concluded that CMRS carriers are entitled to obtain interconnection under section 251(c)(2).[27]

Having already determined that requesting carriers are impaired in their ability to provide telephone exchange service,[28] there are no grounds for separately determining whether CMRS carriers are impaired without access to UNEs when they provide this same service. Even the incumbent LECs concede that any requesting carrier may obtain UNEs for use in the market in which an impairment analysis has been met.[29] The only basis for undertaking a separate analysis would be that CMRS carriers utilize a different technology to provide the telephone exchange service. The Commission, however, has repeatedly stressed that it will apply the statute in a technology neutral manner.

4. The Availability of Incumbent LEC Tariffed Special Access Services is not an Alternative to UNEs.

The fact that CMRS carriers could use or do use costly special access services to meet their interoffice transport needs is irrelevant to the question of whether they are impaired in their ability to provide services without access to dedicated transport. In assessing the availability of alternatives to incumbent LEC network elements for purposes of the impairment analysis, the Commission has emphasized that those alternatives must exist *outside of the incumbent LECs'*

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[27] Interconnection under 251(c)(2) is available to requesting carriers "for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(C)(2)(A).

[28] The UNE Remand Order itself does not state that its impairment finding is limited to "local exchange service." At most, that decision reserved a question whether IXCs would be impaired in the provision of "special access service" without access to loop/transport combinations. Not until the SOC does the Commission suggest that its finding in the UNE Remand Order is limited to "local exchange service."

network.[30] The Commission has repeatedly rejected incumbent LEC arguments that requesting carriers are not impaired without access to dedicated transport as long as they have access to special access or other tariffed services, and it should reject that argument again here. As the Commission concluded in the UNE Remand Order:

> We also reject GTE and US West's argument that competitive LECs have access to ubiquitous transport through the use of the incumbents' special access tariff arrangements. As discussed above, we give little weight to the incumbent LEC's special access tariffs. Moreover, the Commission previously rejected this argument in the Local Competition First Report and Order . . . If we were to adopt the incumbents' approach, the incumbents could effectively avoid all of the 1996 Act's unbundling and pricing requirements by offering tariffed services that, according to the incumbents, would qualify as alternatives to unbundled network elements.[31]

There is yet a further point that bears emphasizing with respect to incumbent LEC tariffed services. Incumbent LECs belittle CMRS carriers' requests to convert special access to unbundled dedicated transport as involving merely an attempt to reduce costs.[32] But the incumbent LECs' argument is predicated on the false and previously rejected assumption that their tariffed transport services are a cognizable alternative to UNEs. This assumption is indefensible under the express holding of the Commission's UNE Remand Order. The

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[29] SOC, 15 FCC Rcd at 9593, ¶ 10 (stating incumbent LEC argument that the availability of UNEs "should be restricted to the carriers that intend to use them -- substantially, though not necessarily exclusively -- in the markets in which the 'impair' standard is met.").

[30] UNE Remand Order, 15 FCC Rcd at 3702, ¶ 70.

[31] UNE Remand Order, 15 FCC Rcd at 3855, ¶ 354. See also id. at 3732-33, ¶ 67.

[32] Qwest, for example, recently suggested that CMRS carriers cannot be impaired because of the rapid growth and "profitability" of the CMRS industry. See Ex Parte Letter from John W. Kure, Qwest, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed Sept. 26, 2001). However, Qwest ignores the fact that CMRS carriers, including nationwide carriers, are saddled with enormous operating costs including the costs associated with special access facilities, and many CMRS carriers are reporting losses.

dispositive issue is not how much cheaper are UNEs than tariffed special access services -- although costs are highly relevant as the Commission has expressly recognized[33] -- the question is what alternatives exist to incumbent LEC unbundled dedicated transport beside incumbent LEC special access services. If there are none, as the Commission found with dedicated transport, then a requesting carrier is impaired without access to those UNEs.

II. The Facilities that CMRS Carriers Seek to Convert Unarguably Qualify As Dedicated Transport.

We describe in this section how CMRS carriers utilize the special access interoffice transmission facilities at issue in this pleading and demonstrate that those facilities qualify as unbundled dedicated transport. Wireless carrier networks rely to a surprisingly large extent on wireline facilities. Typically, only the "last mile" link to the customer's mobile phone utilizes radio spectrum. This "last mile" connection between the mobile phone and base station may be thought of as the wireless loop. The mobile nature of telephone exchange service provided by CMRS carriers derives not so much from the wireless loop, but rather from the sophisticated interplay between the equipment at the base station and centralized base station control equipment often located at mobile switching centers or "MSCs". Working together, the base stations and central controllers continually monitor the quality of the voice signals and, virtually instantaneously, open and close trunks, switching the call from cell site to cell site as the mobile phone user moves about and/or signals otherwise degrade.

In order to provide ever-greater service, CMRS carriers have established tens of thousands of cell sites and those numbers are likely to increase substantially over the next few

[33] Cost is a key factor in determining the practical availability of alternatives. See, e.g., UNE Remand Order, 15 FCC Rcd at 3734, ¶ 72.

years. Each cell site is linked to the base station control equipment, which can serve scores of individual base stations.[34] In the vast majority of cases, this link is established by leasing dedicated transport from incumbent LEC access tariffs. Depending upon the mix of urban and rural areas, the links between the base station and MSCs can be a few miles or literally hundreds of miles.

The CMRS Petitioners have attached three diagrams, **Exhibits A, B and C**, depicting how CMRS carriers utilize incumbent LEC special access or private line facilities. The salient point about those diagrams is the amount of transport that occurs between incumbent LEC wire centers or between incumbent LEC wire centers and the mobile switching center. This transport indisputably falls within the Commission's definition of dedicated transport.[35]

Exhibit A is a diagram that illustrates the elements of a typical point-to-point special access facility employed by the CMRS Petitioners. As the diagram reveals, special access facilities provisioning is much more complex than a simple circuit leased to connect an MSC with a CMRS base station. In fact, rarely do the special access circuits traverse directly from the MSC to CMRS base stations without passing through at least one incumbent LEC serving wire center ("SWC"). Generally, if a CMRS base station is greater than 8 miles from the MSC (which is common), the circuit traverses two or more incumbent LEC wire centers.

Under the access tariffs, CMRS Petitioners must pay separate charges for these various transport links. In the example contained at **Exhibit A**, which is based on the rate elements from a Qwest tariff, CMRS Petitioners are assessed a channel termination charge for every transport

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[34] The base station control equipment in AWS's network, for example, can serve up to seventy individual base stations.

[35] 47 C.F.R. § 51.319(d)(1)(i) (2000).

link between a customer premise and a Qwest serving wire center. Thus, in the example of a T-1 line as shown in the lower left hand corner of **Exhibit A**, CMRS Petitioners pay a channel termination charge for the transport link between the MSC and the incumbent LEC serving wire center and another channel termination charge between the incumbent LEC serving wire center and the base station. CMRS Petitioners also pay a transport charge, based on mileage, for the links between wire centers. In the vast majority of cases, the special access transport facilities span two or more wire centers. If the CMRS Petitioners want to add protection to this transport, they pay a separate set of charges (called self healing alternative route protection or "SHARP" charges under Qwest's tariffs). Finally, as **Exhibit A** also demonstrates, CMRS Petitioners will multiplex T-1s onto DS-3s for transport to the MSC wherever it is efficient to do so. The DS-3 connects the MSC with the incumbent LEC wire center. When multiplexing onto a DS-3, CMRS Petitioners pay for the DS-3 (whether fully utilized or not), which again includes a channel termination charge as well as transport, plus the charges for multiplexing.

Increasingly, CMRS carriers are purchasing interoffice transport as part of existing SONET rings in metropolitan areas. The transport on these ring architectures occurs between incumbent LEC wire centers, and between incumbent LEC wire centers and the MSC. As the diagram attached at **Exhibit B** illustrates, typically, the MSC will connect on the ring and the CMRS carrier will purchase transport along the ring from incumbent LEC hub node (*i.e.*, wire center) to incumbent LEC hub node, paying separate charges for each of these links. From the incumbent LEC hub nodes, the CMRS carrier will purchase point-to-point transport (often a DS-3) to one or more off-ring incumbent LEC wire centers that aggregate traffic arriving over incumbent LEC DS-1s that in turn connect to other incumbent LEC serving wire centers and

eventually to base stations. This architecture is an exquisite example of a requesting carrier utilizing the incumbent LECs' ubiquitous transport facilities to fill out its own network.[36]

Finally, CMRS carriers purchase special access interoffice transmission facilities between MSCs and incumbent LEC tandem switches or other entry points into the incumbent LEC network. These facilities, illustrated in the diagram contained at **Exhibit C**, are used to deliver CMRS originated traffic for termination on the incumbent LECs' network, for example when an AWS mobile customer calls a Verizon wireline customer.[37]

The interoffice transport described above qualifies as unbundled dedicated transport. In relevant part, section 51.319(d) of the Commission's regulations[38] defines the unbundled dedicated transport UNE as follows:

> (1) Interoffice transmission facility network elements include:
> (i) Dedicated transport, defined as incumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not

[36] As long as the SONET transport facilities that the requesting carrier seeks to obtain as UNEs or convert to UNEs are part of the incumbent LEC's network that it has deployed for its own use, SONET ring network elements must be unbundled. UNE Remand Order, 15 FCC Rcd at 3843, ¶ 324. Although in some instances special construction of a fiber facility may be required to connect an MSC to an existing SONET ring, the SONET ring facilities are typically not constructed for use by specific CMRS carriers. Invariably, incumbent LECs will assign CMRS carriers to pre-existing facilities between incumbent LEC wire centers for all legs, with the possible exception of the facility connecting the MSC to the ring. If special construction of a fiber facility is required to connect the MSC with the ring, the incumbent LECs typically require the CMRS carrier to pay the costs of that special construction up front. That some special construction may have been assessed (and recouped) to construct a facility to connect to the ring is irrelevant to a requesting carrier's right to convert to cost-based rates the monthly recurring charges CMRS carriers pay for transport on the existing ring. Having already recouped its construction costs, there is no need for incumbent LECs to amortize and recover those costs through monthly charges over an extended period.

[37] Facilities used to deliver traffic from a carriers' network to an incumbent LEC network qualify as dedicated transport. See UNE Remand Order, 15 FCC Rcd at 3851, ¶ 346.

[38] 47 C.F.R. § 51.319(d)(1)(i) (2000).

> limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. . . ;

As the descriptions and attached diagrams demonstrate, the transport that CMRS carriers purchase from incumbent LEC special access and private line tariffs meet the elements of this definition. The transport constitutes incumbent LEC facilities, it is dedicated to a particular customer (the CMRS provider), and it provides telecommunications between incumbent LEC wire centers and between incumbent LEC wire centers and CMRS switches or wire centers. In large part, that transport described is either between an MSC, which in undisputedly a switch, and an incumbent LEC wire center, or between incumbent LEC wire centers.

In fact, the only real definitional dispute involves the one link in this transport chain between the base station and the incumbent LEC wire center serving that base station. Incumbent LECs contend that the base station is neither a switch nor a wire center and therefore transport to and from the base station does not qualify.[39] On the basis of this contention, incumbent LECs have refused to convert any transport to UNEs. As demonstrated below, however, the incumbent LECs' argument oversimplifies the functions of a base station, which, in fact, performs the central function of a end office switch or wire center, *i.e.,* to terminate traffic to and receive traffic from the end user. Moreover, by focusing only on the transport segment

[39] Verizon, for example, contends that, although it will provide dedicated transport between requesting carrier switches, it will not provide transport between the MSC and the base station because the base station is not a switch. See Ex Parte Letter from W. Scott Randolph, Director-Regulatory Affairs, Verizon, to Magalie Roman Salas, FCC Secretary, CC Docket 96-98 (filed August 22, 2001).

between the base station and its serving wire center, the incumbent LECs ignore the other transport reflected in the attached diagrams and described above.[40]

III. Transport from Incumbent LEC Serving Wire Centers to Base Stations Qualifies as Unbundled Dedicated Transport.

A. Base Stations Perform Switch or End Office Functions.

The incumbent LECs resist the CMRS Petitioners' requests for conversion of special access facilities to UNEs by contending that such transport involves the backhaul of telecommunications from base stations to MSCs and base stations are neither a switch nor a wire center. The incumbent LECs' position should be rejected. CMRS base stations contain sophisticated electronics that, together with other elements of the CMRS network, provide end users with the same, if not greater, functionality than wireline networks. Without this base station equipment, calls could not be terminated to or received from end users. Like a wireline end office, the base station is the first and last intelligent point that the end user contacts in the network. The base station is necessary for termination and origination because the equipment at the MSC by itself cannot terminate a call to an end user.

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[40] Certain incumbent LECs have treated certain of this transport differently in response to CMRS carrier requests for conversion to unbundled network elements. For example, in a June 5, 2001 conference with VoiceStream representatives, BellSouth indicated its consent to conversion of a certain number of these special access facilities, even agreeing to prepare a list of circuits for VoiceStream that would be eligible for conversion. This agreement was confirmed by a July 19, 2001 letter from VoiceStream to BellSouth. (This letter was previously filed with VoiceStream's ex parte submission on November 5, 2001). After the June 5, 2001 conference, BellSouth reneged on its agreement to identify those special access circuits that it had initially agreed to convert to unbundled dedicated transport, and subsequently advised VoiceStream by July 11, 2001 letter (received on July 17, 2001) that "[u]ntil the FCC provides us guidance on the provisioning of UNEs to wireless carriers, BellSouth will not convert special access circuits used to provide wireless service to UNEs. Further, BellSouth will not provision new circuits used in the provision of wireless services as UNEs." Letter of Leah G. Cooper, Attorney, BellSouth Telecommunications, Inc. to Douglas G. Bonner, Counsel to VoiceStream (July 11, 2001).

Wireless base stations perform a number of switching functions. They transmit signaling information to the MSC that registers a mobile customer's location. The base station opens the communications path that makes this possible. The equipment at base stations also continually monitors the quality and signal strength of the call so that calls can be handed off from one cell cite to another.

The base station itself cannot perform all of the functions necessary to switch calls between cell sites. As noted above, the mobility provided by CMRS networks is the result of the interplay between the base station and the centralized base station control equipment. By necessity, some of the functionality required for mobility must reside in the centralized base station control equipment in order to permit call hand-offs from cell to cell. In wireline networks, more call processing functions can be located at end offices because wireline end users are "hardwired" to the end office. This technology distinction between wireline and wireless telecommunications providers is necessary to achieve mobility and it does not undermine the key fact that base stations perform critical call termination and origination functions and therefore are the functional equivalent of wireline end offices.

Some incumbent LECs argue that base stations are not switches under the Commission's rules by describing the network functionality that incumbent LECs must make available to requesting carriers as unbundled switching.[41] However, the Commission's description of the functionality that incumbent LECs must provide should not control the definition of a "switch" for purposes of defining dedicated transport. As far as the CMRS Petitioners are aware, the

[41] Incumbent LECs cite section 51.319(c)(1), which defines the "local circuit switching capability" that incumbent LECs must provide as a UNE. See, e.g., Ex Parte Letter from

Commission has not defined what constitutes a switch. In the absence of a Commission definition, the Commission should defer to common usage.[42] Newton's, for example, defines a "switch" as "[a] mechanical, electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or selects paths or circuits."[43] Base stations fall within this definition of a switch. Base stations complete an electrical path between the MSC and the end user because they extend radiofrequency channels necessary for communication from the CMRS network to the end user.[44] Base stations also select a path between (i) the end user and the MSC by picking-up an end user's handset transmissions on an appropriate wireless channel for transport to the base station, and (ii) between the base station and the MSC by placing the communications on an appropriate wireline channel for transport to the MSC.

CMRS base stations also perform concentration functions. Concentration is one of the primary functions of a switch. Without this function, every telephone would require an interconnecting line to every other telephone in the network. Just as a wireline switch allows a large number of customer lines to connect to other network facilities via a much smaller number of trunks, so too CMRS base stations connect a large number of wireless customer lines to the

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Kathleen Levitz, BellSouth, to Michelle Carey, Chief, Policy and Program Planning Division, Common Carrier Bureau, CC Docket 96-98 (filed Oct. 10, 2001) at 4-5.

[42] See e.g., United States v. Roberts, 88 F.3d 872, 877 (10th Cir. 1996) (holding that, when a tribunal is confronted with a undefined term, "its common and ordinary usage may be obtained by reference to a dictionary").

[43] Newton's Telecom Dictionary 662 (17th ed. 2001).

[44] The Commission's regulations equate a wireless channel with an "electrical path." 47 C.F.R. Part 36, Appendix-Glossary (definition of "channel"). Because CMRS base stations function by assigning wireless channels to end user handsets, forming a connection between end users and the CMRS network for the conveyance of information over those wireless channels, CMRS base stations undoubtedly complete electrical paths.

MSC via a much smaller number of trunks. In each case, the limited number of trunk facilities are at any particular time switched to serve those customers who need access to the available trunks.

Further, even if the incumbent LECs were correct, and the Commission's Part 51 definition of switching functionality controlled what is meant by the term "switch," Commission precedent dictates that CMRS base stations are switches. For example, section 51.319(c)(1)(iii)(A) of the Commission's regulations provides that a switch functions to, among other things, connect "lines to lines [or] lines to trunks." CMRS base stations perform this function because they connect end users' wireless channels to the lines (or trunks) leased from incumbent LEC special access/private line tariffs that connect the base station to the MSC. Because wireless channels are unquestionably "lines,"[45] CMRS base stations connect lines to lines (or lines to trunks) and are thus switches.

In other regulatory contexts, the Commission has acknowledged that switching may take forms other than traditional, wireline circuit switching. For purposes of reciprocal compensation, for example, carriers receive compensation for the "termination" of traffic, which is defined as "the switching of local telecommunications traffic at the terminating carrier's end

[45] The Communications Act defines the term "line" to cover more than just actual wires. Instead, the Act equates "line" with "any channel of communication." See 47 U.S.C. § 214(a). See also Regulatory Policies and International Telecommunications, CC Docket No. 86-494, Notice of Inquiry and Proposed Rule Making, 2 FCC Rcd 1022, ¶ 83 (1987). The Commission also equates the terms line and wireless channels for local competition reporting purposes. See Instructions for the Local Competition and Broadband Reporting Form, FCC Form 477, ("[A] voice-grade equivalent line (or wireless channel) is a line or channel that directly connects an end user to a carrier and allows the end user to originate and terminate local telephone calls on the public switched network.").